

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
KERRY ASHDOWN, : Docket # 13CV1374
Plaintiff, :
- against - :
EQUINOX, et al., : New York, New York
Defendants. : September 13, 2013

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PROCEEDINGS BEFORE
THE HONORABLE GABRIEL W. GORENSTEIN,
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording;
Transcript produced by transcription service

INDEXE X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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THE COURT: Hello, this is Judge Gorenstein.
Who's on the line?

MR. WALKER HARMAN: Walker Harman for the
plaintiff Kerry Ashdown.

MR. PATRICK McPARTLAND: Good afternoon, Judge,
Pat McFarland for defendant Equinox.

THE COURT: Mr. Harman, are you on speakerphone?

MR. HARMAN: Yes, I am.

THE COURT: If you come off, it'll be a help to
me.

MR. HARMAN: Sorry about that.

THE COURT: That's no problem. Okay, we're being
recorded. It's the case of Ashdown v. Equinox, 13cv1374.

ATTORNEY: (inaudible)

THE COURT: Oh, I'll try to speak up a little
bit. We're being recorded. We're here based on three
letters that were dated September 9. I recall reading
them, the way I recall the problem is, you know, I had
ordered production of prior complaints. I left open the
possibility if there was burdensomeness, to hear the
defendants on that. I understand that the defendants don't
have a problem with sort of filed complaints or litigation
type complaints but that they have a problem in some way
with retrieving internal complaints. Is that right?

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MR. McPARTLAND: Yes, that's correct, Judge.
I've gone back --
(interposing)
MR. McPARTLAND: Sure, I've gone back and
revisited with our Director of Human Resources how these -
what they would need to undertake to actually locate these
types of complaints.
THE COURT: They don't keep a file of internal
complaints?
MR. McPARTLAND: They do not. They do not keep a
log or a separate file of internal complaints. So it
would, these are - it's 20, I believe it was 20 clubs in
the New York City area, fitness clubs, at which there are
typically more than 100 employees over a five-year period.
And this would involve human resources going back and
basically digging through personnel files and other records
to come up with, you know, internal complaints that
obviously never even made it to any type of litigation
level that probably, you know, don't even have anything to
do with the people involved in this case.
So it's too burdensome for our client to do that
given the, you know, minimal relevance. This case is very
specific as to the people that we're allegedly
discriminatory towards plaintiff.

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THE COURT: I'm a little --

MR. HARMAN: Your Honor --

THE COURT: I'm a little nonplussed only because I think it's literally the first time I've heard of corporation of any size with a human resources office that didn't keep a record of complaints of discrimination. It's just almost incredible. You personally verified that?

MR. McPARTLAND: I was informed by the - I spoke to the Director of Human Resources. They do not keep a log.

THE COURT: It's just amazing. So the proposal for how to do this would be to look - so what happens to, when someone comes in and says I've been discriminated against because of my race, religion, whatever the protected categories are, is there a process, is there handbook that describes that it, is there something that's supposed to happen, is there a way they're supposed to do it? Is any of that --

MR. McPARTLAND: Well, no, I mean there are ways in the employee manual to complain, for them to lodge complaints. There are three different ways basically. You can go to your supervisor, you can go directly to human resources or Equinox also, as a third-party venture which maintains the confidential, a 1-800 confidential hotline

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2 that the employee can call. But with respect to complaints
3 to supervisors or complaints to HR, I mean those can come
4 in virtually any form. I mean it could be an email, it
5 could be a telephone call, it could be somebody who walks
6 into the office.

7 THE COURT: And do they have a process for
8 handling complaints that involves a written record?

9 MR. McPARTLAND: It depends on whether the, you
10 know, I mean there's whatever the investigation is. You
11 know, HR determines what investigation they're gonna
12 conduct.

13 THE COURT: And they don't keep a record of their
14 investigations?

15 MR. McPARTLAND: No, they do keep a record of
16 their investigation, Judge, but they need to go back in and
17 go through, you know, files basically, personnel files --

18 (interposing)

19 THE COURT: No, no, back up, back up, back up.

20 MR. McPARTLAND: Sure.

21 THE COURT: I asked do they keep a record of
22 their investigation, and so the answer's yes. The next
23 question is in what form and what location do they keep a
24 record of the investigation?

25 MR. McPARTLAND: It could be in the form of

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2 emails, could in the form of, you know, a meeting on the
3 investigation, it could be in the form of handwritten
4 notes. Could be in the form of notice that goes --

5 (interposing)

6 MR. McPARTLAND: I'm sorry.

7 THE COURT: I think where we have to go with
8 this, I tell you right now, is I need someone to swear this
9 to me under oath because I don't trust the information
10 you're getting about this. It doesn't make sense to me.
11 It doesn't make sense, I mean I understand maybe with
12 supervisors, you know, there's no process. But I'd like
13 someone to swear an oath in public that this human resource
14 office does not keep a specific record of investigations
15 other than something that ultimately gets put in a
16 personnel file and has no other way of retrieving it. It's
17 so incredible to me, I'd like to see it under oath.

18 Now, if they say under oath, then we'll decide
19 whether Mr. Harman should get further discovery on that,
20 but I need an affidavit that's gonna describe this burden,
21 and even if they say it under oath, describe what possible
22 means they could think to do it because I'm not sure I'm
23 gonna let them off the hook on this. So I think before we
24 do anything further, we have to do that.

25 MR. McPARTLAND: Okay, I'll go back to --

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(interposing)

THE COURT: Now, I don't want people to, you know, think, oh, they told you one thing. You better have a talk with them. You know, they told you one thing and now they're just gonna say in the affidavit, because it's gonna create big problems for them, if, in fact, it's not accurate. So you need to obviously sit down with them and talk about this and make sure they get this 100 percent accurate. Right?

MR. HARMAN: Your Honor, I just want to add for the record that I deposed a general manager of the Soho location today, and he indicated in his deposition that he was accused of making an inappropriate comment of a sexual nature and that he was himself taken through a process where he was interviewed by HR and he was issued corrective action and he had to countersign the corrective action and that there was a whole process that he was brought through because an individual complained that he made an inappropriate conduct, a comment. And it's just hard for me to believe that HR doesn't maintain records on that sort of stuff. I just don't get it.

MR. McPARTLAND: He testified as to one - it's actually, you know, it --

(interposing)

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THE COURT: Well, hold on, I'm not sure what --
(interposing)

THE COURT: Hold on, hold on.

MR. McPARTLAND: Sure.

THE COURT: Mr. Harman is in agreement, it sounds
like, with my proposal.

MR. HARMAN: Yes, I am. So long as it contains
detail of what it would take to search for records and
information --

THE COURT: We definitely need to hear that, Mr.
McPartland --

MR. McPARTLAND: Okay.

THE COURT: -- and don't think that you're
necessarily off the hook or your client rather is off the
hook. So this needs to be taken much more - this needs to
be outlined in great detail and under oath and soon. So
let's shoot - today is what, Thursday? I assume we could
do this, could we do this by Monday, Tuesday?

MR. McPARTLAND: Tuesday would be better, Judge.
I'm gonna be in - we have another deposition scheduled
tomorrow afternoon. Tomorrow morning I'm in court.

THE COURT: All right, well, I want to get this
right, so why don't we say Wednesday of next week.

MR. McPARTLAND: Okay, that'll be great.

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THE COURT: And then --

MR. McPARTLAND: Judge, the only other issue I would raise here, you know, the case law in this area, I'm looking, you know, particularly at a case, Vuona v. Merrill Lynch in the SDNY. They --

THE COURT: Give me the citation.

MR. McPARTLAND: Sure, it's 2011 - it's a Westlaw citation, 2011 WL 5553709, and it's from the Southern District from November 15 of 2011. It's a very similar complaint where they were looking for, you know, complaints about any other personnel at a branch who may have come into contact with these trainees at Merrill Lynch. The Court concluded that it was just, you know, it was overbroad, you know, the complaint says of gender discrimination as to any manager at the branch who had any contact with these trainees was overbroad. But the way I understand it is they limited it just to the employees who actually terminated the plaintiffs, which is certainly, you know, we would certainly be amendable to that.

THE COURT: What was the last thing, they limited it to what, I'm sorry?

MR. McPARTLAND: It's my understanding is they limited it just to managers who actually supervised these trainees. In other words, they didn't have to, you know,

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2 if there were other managers in the branch, you know, you
3 didn't have to, they didn't have to dig around and look for
4 complaints about all these other managers.

5 And what's happening is we have to go through, you
6 know, this is one specific health club in New York City,
7 and we're gonna have to produce complaints from 19 other
8 clubs. I mean it's --

9 THE COURT: Well, the way --
10 (interposing)

11 MR. McPARTLAND: -- it is burdensome and it's
12 overbroad.

13 THE COURT: I mean is it that - I think when we
14 first went through this in the hearing, and maybe I
15 remember this incorrectly. When we went through it in the
16 hearing, the contention was that the decision to fire was
17 not made in that particular health club, that that was made
18 at some corporate level. Am I wrong?

19 MR. McPARTLAND: No, it was made by the general
20 manager of the club and an area manager of the club, but
21 the people who were involved can easily --

22 THE COURT: Hold on, stop, stop.

23 MR. McPARTLAND: I'm sorry.

24 THE COURT: Area manager of the club, which means
25 not someone in that particular club. Right?

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MR. McPARTLAND: Well, he's not associated with any particular club, Judge, that's correct.

THE COURT: Right, right --

MR. McPARTLAND: But I could explain that a little bit --

THE COURT: That was the basis - well, no. But I mean that was the basis - if you told me that this was entirely a decision of an individual in a particular club, I might have made a different ruling, but that's not what I was told. I was told that there was someone at a higher level who, in fact, supervised at least these New York City clubs if not more.

MR. McPARTLAND: Well --

THE COURT: My issue was what kind of complaints and how did that person act with respect to other employees, and that to me seems entirely relevant even under the Vuona case.

MR. McPARTLAND: Right, how that particular - which, Judge, with respect to that, those particular individuals. I guess the point is that these are not necessarily complaints that would have - if there was a complaint as to - the area manager in question here is Matt Plotkin. He's the guy on the corporate level overseeing the clubs. Any complaint as to Matt Plotkin I'm happy to

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2 produce.

3 THE COURT: I'm not talking that as to Matt, I'm
4 not talking about as to Matt Plotkin. I'm talking about
5 complaints for which Matt Plotkin made a decision.

6 MR. McPARTLAND: For which he made a decision.

7 THE COURT: Yeah.

8 MR. McPARTLAND: Okay.

9 MR. HARMAN: But wait a minute, I mean like you -
10 this was first raised almost a month ago with specificity
11 in court, and we talked about a corporate, HR corporate
12 decision-making process that involved a lot of different
13 people reviewing employment related decisions and
14 addressing my client's cancer and making decisions
15 regarding termination. And so I thought that this issue
16 had been resolved, and now it's being reargued and a case
17 citation that's being thrown out. And with all due respect
18 --

19 THE COURT: I'm not changing my ruling, Mr.
20 Harman. I'm sorry, I hope I wasn't unclear just now. I
21 didn't mean you could limit it, Mr. McPartland, to Mr.
22 whatever that guy's name was, Plotkin. I mean that, I'm
23 pointing to why it's relevant that - I'm assuming that
24 complaints about these 19 clubs ultimately were handled by
25 Mr. Plotkin. Am I wrong?

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2 MR. McPARTLAND: No, no, that would not be
3 accurate. That would not be accurate, Judge.

4 THE COURT: Why?

5 MR. McPARTLAND: Because Mr. Plotkin does not
6 oversee these clubs in that capacity. There are only
7 certain issues that may involve him. I mean I guess that's
8 the only way I'm trying to limit this, and then it would
9 be, the issue would be resolved. If it's just any
10 complaints that Matt Plotkin would have been involved in or
11 supervised over or that, you know, Lawrence Sanders as the
12 GM of the club would have been involved in and supervised
13 over, if I can limit it to the complaints that have some
14 nexus to these people, I'm fine with that. I don't - it's
15 just that there are going to be, you know, there could be
16 complaints from, you know, somebody who complained to their
17 maintenance manager at the club level. It's just, it's -
18 which would not go up to Matt Plotkin.

19 THE COURT: Well, we're cutting it too fine right
20 now because I don't know what is available to you and what
21 is not. Right now it sounds like complaints made to
22 supervisors is not even gonna be an issue because that I at
23 least might understand that if - HR is never informed about
24 something, that that's gonna be hopeless. But if HR is
25 informed about something, I imagine something happening at

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2 corporate headquarters, I assume HR is involved, and I
3 don't see how this is not gonna be relevant. But if you
4 wish in your affidavit make some argument about this based
5 upon information in the affidavit, you can say something,
6 and Mr. Harman can respond.

7 MR. McPARTLAND: Okay.

8 THE COURT: But at this point I don't imagine
9 changing my ruling.

10 MR. McPARTLAND: Okay.

11 THE COURT: All right, so what's, you know, do
12 this on Wednesday and, Mr. Harman, you can respond, when do
13 you want to respond, Thursday, Friday?

14 MR. HARMAN: Friday's fine.

15 THE COURT: Okay. And then if I can do it on the
16 letters, I'll do it on the letters; otherwise I'll set up
17 another phone conference I guess.

18 MR. McPARTLAND: Okay.

19 MR. HARMAN: Okay.

20 THE COURT: All right, thank you, everyone.

21 MR. McPARTLAND: I'm sorry, we were just wrapping
22 up depositions, and the parties have had some, you know,
23 some items that have come during the depositions for
24 follow-up discovery. We've given each other lists already,
25 and the discovery deadline is on Sunday.

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So I just want to clarify, you know, how that will be handled. In other words, if someone has a dispute that somebody did not produce something that is responsive or relevant to the kids based on this follow-up discovery from depositions, you know, what is the parties' recourse?

THE COURT: Well, if it's something that's sort of been produced and it was reasons that people didn't raise it beforehand, then I'm not gonna stop them from raising it, I'm not gonna stop it from getting produced after the discovery deadline. I'm not gonna move any of the other deadlines, but we're gonna finish out what has to be finished out.

MR. McPARTLAND: Okay.

THE COURT: Okay, any questions, Mr. Harman?

MR. HARMAN: No, Your Honor, thank you.

THE COURT: Anything from the defendant?

MR. McPARTLAND: Nothing, thank you, Judge.

THE COURT: All right, thank you.

(Whereupon the matter is adjourned.)

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C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Ashdown v. Equinox, et al., Docket #13-cv-1374, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature_____

Date: September 15, 2013